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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 CHRISTIANA TRUST,

8 Plaintiff(s),

9 v.

10 HOLLYWOOD RANCH HOMEOWNERS
11 ASSOCIATION, et al.,

12 Defendant(s).

Case No. 2:17-CV-2441 JCM (NJK)

ORDER

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14 Presently before the court is the matter of *Christiana Trust v. Hampton & Hampton*
15 *Collections, LLC et al*, case no. 2:17-cv-02441-JCM-NJK. This order addresses the following
16 motions:

- 17 1. Defendant Hollywood Ranch Homeowner's Association's ("the HOA") motion to
18 dismiss. (ECF No. 16). Plaintiff Christiana Trust ("plaintiff") filed a response
19 (ECF No. 17), to which the HOA replied (ECF No. 20).
- 20 2. The HOA's motion for summary judgment. (ECF No. 50). Plaintiff filed a
21 response (ECF No. 54), to which the HOA replied (ECF No. 58).
- 22 3. Plaintiff's motion for summary judgment. (ECF No. 51). The HOA filed a
23 response (ECF No. 55), to which plaintiff replied (ECF No. 59).
- 24 4. Defendant Nevada Legal Support Services' ("NLSS") motion for summary
25 judgment. (ECF No. 35). Plaintiff filed a response (ECF No. 42). Plaintiff has
26 not filed a reply, and the time for doing so has since passed.
- 27 5. Plaintiff's first motion for leave to conduct discovery. (ECF No. 18). The HOA
28 filed a response (ECF No. 21), to which plaintiff replied (ECF No. 23).

1 6. Plaintiff's second motion for leave to conduct discovery. (ECF No. 43).

2 Defendants have not filed a response, and the time for doing so has since passed.

3 7. Plaintiff's motion to stay case. (ECF No. 19). The HOA filed a response (ECF
4 No. 22), to which plaintiff replied (ECF No. 24).

5 **I. Facts**

6 This action arises from a dispute over real property located at 6436 Za Zu Pitts Avenue,
7 #101, Las Vegas, Nevada. (ECF No. 1 at 2).

8 Dorothy Ann Jones ("Jones") purchased the property on or about August 29, 2008. *Id.* at
9 3. Jones financed her purchase of the property with a loan in the amount of \$142,759.00 from DHI
10 Mortgage Company ("DHI"). *Id.* DHI secured the loan with a deed of trust, which names itself
11 as the lender, DHI Title NV Laura Bronson as the trustee, and Mortgage Electronic Registration
12 Systems, Inc. ("MERS") as the beneficiary. *Id.*

13 On April 7, 2010, the HOA recorded a notice of delinquent assessment ("HOA lien")
14 against the property for Jones' failure to pay her HOA dues. *Id.* at 4. On May 17, 2010, the HOA
15 recorded a notice of default and election to sell pursuant to the lien. *Id.*

16 On October 10, 2011, an assignment of the deed of trust was recorded, assigning interest
17 in the property to Bank of America, N.A. ("BANA"), successor by merger to BAC Home Loans
18 Servicing, LP fka Countrywide Home Loans Servicing, LP. *Id.* On August 20, 2012, the HOA
19 recorded a second notice of default and election to sell pursuant to the lien. *Id.* at 5. The HOA
20 mailed a copy of the second notice to all interested parties, including BANA. (ECF No. 50-3).

21 On February 4, 2013, the HOA recorded a notice of trustee's sale. (ECF No. 50-4). The
22 HOA mailed a copy of the notice to all interested parties, including BANA. (ECF No. 50-5). On
23 May 21, 2013, the property was sold at public auction for \$9,000.00. (ECF No. 50-8). On July 3,
24 2013, a foreclosure deed was recorded against the property. (ECF No. 1 at 5).

25 On October 15, 2014, plaintiff Christiana Trust, a division of Wilmington Savings Fund
26 Society, FSB, not in its individual capacity, but as trustee of ARLP Trust, acquired all beneficial
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1 interest in the property via a corporate assignment of the deed of trust, which plaintiff recorded.¹
2 *Id.*

3 **II. Legal Standard**

4 *a. Motion to dismiss*

5 A court may dismiss a complaint for “failure to state a claim upon which relief can be
6 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
7 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
9 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
10 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

11 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
12 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
13 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
14 omitted).

15 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
16 when considering motions to dismiss. First, the court must accept as true all well-pled factual
17 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
18 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
19 statements, do not suffice. *Id.* at 678.

20 Second, the court must consider whether the factual allegations in the complaint allege a
21 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
22 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
23 alleged misconduct. *Id.* at 678.

24 Where the complaint does not permit the court to infer more than the mere possibility of
25 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*

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28 ¹ Prior to plaintiff acquiring all beneficial interest in the trust, the deed of trust was assigned
to several other institutions, none of which are parties to this case, and none of which maintains
any current interest in the property.

(internal quotation marks omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

b. Summary Judgment

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts showing that there is a genuine issue for trial.” *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

1 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
2 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
3 element of the non-moving party's case; or (2) by demonstrating that the nonmoving party failed
4 to make a showing sufficient to establish an element essential to that party's case on which that
5 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
6 party fails to meet its initial burden, summary judgment must be denied and the court need not
7 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
8 60 (1970).

9 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
10 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
11 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
12 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
13 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
14 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
15 631 (9th Cir. 1987).

16 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
17 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
18 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
19 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
20 for trial. *See Celotex*, 477 U.S. at 324.

21 At summary judgment, a court's function is not to weigh the evidence and determine the
22 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
23 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
24 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
25 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
26 granted. *See id.* at 249–50.

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1 **III. Discussion**

2 On September 18, 2017, plaintiff initiated this action against defendants. (ECF No. 1). In
3 its complaint, plaintiff raises seven causes of action: (1) negligence; (2) negligence per se; (3)
4 breach of contract; (4) misrepresentation; (5) breach of the covenant of good faith and fair dealing;
5 (6) wrongful/defective foreclosure; and (7) unjust enrichment. *Id.*

6 As a preliminary matter, negligence per se is not a cognizable legal claim under Nevada
7 law. “Although sometimes pled as such, negligence per se is not a separate cause of action, but a
8 doctrine in which the duty and breach elements of a negligence claim are assumed as a matter of
9 law.” *Insko v. Aetna Health & Life Ins. Co.*, 673 F.Supp.2d 1180, 1191 (D. Nev. 2009).
10 Accordingly, the court will dismiss plaintiff’s second claim for “negligence per se.”

11 *a. The HOA’s motion to dismiss*

12 The HOA argues in its motion to dismiss that plaintiff’s claims are time-barred by their
13 respective statutes of limitations. (ECF No. 16). The HOA correctly argues that plaintiff’s claims
14 accrued when the foreclosure sale took place. *Id.* at 3. *See Bank of New York Mellon v. Traccia*
15 *Cmt’y. Ass’n*, No. 2:17-cv-1802-JCM-CWH, 2018 WL 1459127, at *4 (D. Nev. Mar. 23, 2018)
16 (“Further, NRS 11.070 sets forth a five-year limitations period for quiet title claims. . . The
17 foreclosure sale took place on January 18, 2013. Plaintiff brought this lawsuit less than five years
18 later . . . Accordingly, plaintiff’s quiet title claim is not barred by the applicable statute of
19 limitations.”); *Bank of New York Mellon Trust Co., N.A. v. Jentz*, No. 2:15-cv-1167-RCJ-CWH,
20 2016 WL 4487841, at *2-3 (D. Nev. Aug. 24, 2016).

21 Accordingly, taking the facts alleged in plaintiff’s complaint as true, plaintiff’s claims
22 accrued no later than July 3, 2013.² (ECF No. 1 at 5). Plaintiff initiated this action just over four
23 years later, on September 18, 2017. (ECF No. 1). The court will now address whether plaintiff’s
24 claims are time-barred.

25 ² Plaintiff does not state in its general allegations the date on which the foreclosure sale
26 took place. However, plaintiff does allege that on July 3, 2013, a foreclosure deed was recorded
27 against the property, showing that Underwood Partners, LLC paid \$9,000 at the HOA sale. (ECF
28 No. 1 at 5). Therefore, the court may infer, for the purpose of the HOA’s motion to dismiss, that
 plaintiff alleges the foreclosure sale took place at some point prior to July 3, 2013. The record
 demonstrates, however, that the actual date of the foreclosure sale was May 21, 2013. (ECF No.
 50-7).

1 *i. Negligence*

2 NRS 11.190(4)(e) provides that the statute of limitations for negligence claims is two years.
3 Nev. Rev. Stat. § 11.190(4)(e). Therefore, plaintiff's first claim for negligence is time-barred and
4 will be dismissed.

5 *ii. Misrepresentation*

6 Plaintiff does not specify whether it intended its fourth claim for "misrepresentation" to be
7 pleaded as fraudulent misrepresentation or negligent misrepresentation. (ECF No. 1 at 12–13).
8 However, in Nevada, "[t]he nature of the claim, not its label, determines what statute of limitations
9 applies." *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 260 (Nev. 2016).

10 Plaintiff alleges in its complaint that "[t]he HOA failed to exercise reasonable care or
11 competence in communicating the information within the provisions of the CC&Rs and Restated
12 CC&Rs, including without limitation, the Mortgagee Protection Clause. . ." (ECF No. 1 at 13).
13 This "reasonable care" language satisfies one of the required elements for a claim of negligent
14 misrepresentation under Nevada law. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441 (1998).
15 Therefore, the court will construe plaintiff's fourth claim as one for negligent misrepresentation
16 and apply the three-year statute of limitations for such actions pursuant to NRS 11.190(3)(d).

17 Accordingly, plaintiff's fourth claim is time-barred and will be dismissed.

18 *iii. Breach of the covenant of good faith and fair dealing*

19 Plaintiff's fifth claim for breach of the covenant of good faith and fair dealing is governed
20 by the four-year limitations period set forth in NRS § 11.190(2)(c). *See* Nev. Rev. Stat. §
21 11.190(2)(c) (four-year period for "[a]n action upon a contract, obligation or liability not founded
22 upon an instrument in writing). *See also Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp.
23 2d 1090, 1094-95 (D. Nev. 2006).

24 Therefore, plaintiff's fifth claim is time-barred because it was not filed within four years
25 of the foreclosure sale. Accordingly, the court will dismiss plaintiff's fifth claim.

26 *iv. Wrongful/defective foreclosure*

27 In its motion to dismiss, the HOA contends that plaintiff's wrongful foreclosure claim is
28 governed by NRS 11.190(3)(a)'s three-year statute of limitations on actions based "upon a liability

1 created by statute, other than a penalty or forfeiture.” (ECF No. 16 at 4). A claim for wrongful
2 foreclosure "challenges the authority behind the foreclosure, not the foreclosure act itself.”
3 *McKnight Family, LLP v. Adept Mgmt. Servs.*, 129 Nev. 610, 616 (2013). NRS Chapter 116,
4 which authorizes HOAs to enforce liens by non-judicial foreclosure, is the authority behind the
5 sale at issue here.

6 Plaintiff alleges that the HOA violated various provisions of NRS Chapter 116 when
7 conducting this sale. (ECF No. 1 at 14). Plaintiff’s wrongful-foreclosure claim is thus an "action
8 upon a liability created by statute," and is therefore governed by the three-year statute of limitations
9 set forth in NRS 11.190(3)(a). Therefore, plaintiff’s sixth claim is time-barred because it was not
10 filed within three years of the foreclosure sale. Accordingly, the court will dismiss plaintiff’s sixth
11 claim.

12 *v. Unjust enrichment*

13 In Nevada, the statute of limitations for an unjust enrichment claim is four years. Nev.
14 Rev. Stat. § 11.190(2)(c); *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 252 P.3d 681, 703
15 (Nev. 2011). Accordingly, because plaintiff initiated this action more than four years after its
16 claims accrued, the court will dismiss plaintiff’s seventh claim for unjust enrichment.

17 *vi. Breach of contract*

18 In Nevada, an action upon a contract, obligation, or liability founded upon an instrument
19 in writing is governed by the six-year limitations period set forth in NRS § 11.190(1)(b). *See Nev.*
20 *Rev. Stat. § 11.190(1)(b)*. Because plaintiff’s third claim for breach of contract was filed within
21 six years of the foreclosure sale, plaintiff’s third claim is not time-barred by the applicable statute
22 of limitations and will not be dismissed on those grounds.

23 As a result of the foregoing, the only claim that remains is plaintiff’s claim for breach of
24 contract, which the court will now address pursuant to plaintiff and defendant HOA’s cross-
25 motions for summary judgment.

26 *b. Plaintiff and defendant HOA’s cross-motions for summary judgment*

27 Plaintiff’s sole remaining claim for breach of contract is predicated on the notion that the
28 HOA’s CC&Rs constitute a contract for which plaintiff is a third-party beneficiary. (ECF No. 1

1 at 12). Plaintiff argues in its motion for summary judgment that the “CC&Rs specifically provide
2 for the protection of deeds of trust recorded against a property within the association.” (ECF No.
3 54 at 10). Plaintiff alleges that the HOA’s foreclosure of the property, which extinguished
4 plaintiff’s first deed of trust, constitutes a breach of the HOA’s CC&Rs. *Id. See* (ECF No. 1 at
5 12).

6 However, the Nevada Supreme Court has held that NRS 116.3116 defeats this argument.
7 *See SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014). In *SFR*, the Nevada
8 Supreme Court held:

9 Chapter 116's "provisions may not be varied by agreement, and rights conferred by
it may not be waived . . . [e]xcept as *expressly* provided in' Chapter 116. (Emphasis
10 added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's
11 right to a priority position for the HOA's super priority lien." *See 7912 Limbwood*
12 *Court Trust*, 979 F. Supp. 2d at 1153; The mortgage savings clause thus does not
13 affect NRS 116.3116(2)'s application in this case. *See Boulder Oaks Cmty. Assn v.*
14 *B & J Andrews Enters., LLC*, 125 Nev. 397, 407, 215 P.3d 27, 34 (2009) (holding
that a CC&Rs clause that created a statutorily prohibited voting class was void and
unenforceable).

14 *Id.*

15 Therefore, plaintiff is not entitled to relief on this claim as a matter of law. Accordingly,
16 the court will grant defendant’s motion for summary judgment on plaintiff’s last remaining claim
17 for breach of contract.

18 *c. The parties’ remaining motions*

19 Still pending in this case are the following motions: (1) defendant NLSS’s motion for
20 summary judgment (ECF No. 35); (2) plaintiff’s first motion for leave to conduct discovery (ECF
21 No. 18); (3) plaintiff’s second motion for leave to conduct discovery (ECF No. 43); and (4)
22 plaintiff’s motion to stay case (ECF No. 19). Because the court has granted summary judgment in
23 favor of the HOA, thereby determining that plaintiff is not entitled to relief on any of its claims,
24 the court will deny these pending motions as moot.

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1 **IV. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant Hollywood
4 Ranch Homeowner's Association's motion to dismiss (ECF No. 16) be, and the same hereby is,
5 GRANTED in part, and DENIED in part, consistent with the foregoing.

6 IT IS FURTHER ORDERED that defendant Hollywood Ranch Homeowner's
7 Association's motion for summary judgment (ECF No. 50) be, and the same hereby is,
8 GRANTED.

9 IT IS FURTHER ORDERED that plaintiff Christiana Trust's motion for summary
10 judgment (ECF No. 51) be, and the same hereby is, DENIED.

11 IT IS FURTHER ORDERED that defendant Nevada Legal Support Services' motion for
12 summary judgment (ECF No. 35) be, and the same hereby is, DENIED as moot.

13 IT IS FURTHER ORDERED that plaintiff Christiana Trust's first motion for leave to
14 conduct discovery (ECF No. 18) be, and the same hereby is, DENIED as moot.

15 IT IS FURTHER ORDERED that plaintiff Christiana Trust's second motion for leave to
16 conduct discovery (ECF No. 43) be, and the same hereby is, DENIED as moot.

17 IT IS FURTHER ORDERED that plaintiff Christiana Trust's first motion to stay case (ECF
18 No. 19) be, and the same hereby is, DENIED as moot

19 DATED September 21, 2018.

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21 UNITED STATES DISTRICT JUDGE
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